BEST AVAILABLE COPY

(6)

Supreme Court, U.S.
FILED
FEB 24 2006
OFFICE OF THE CLERK

No. 05-200

In the Supreme Court of the United States

EMPIRE HEALTHCHOICE ASSURANCE, INC., DBA EMPIRE BLUE CROSS BLUE SHIELD, PETITIONER

v.

DENISE F. MCVEIGH, AS ADMINISTRATRIX OF THE ESTATE OF JOSEPH E. MCVEIGH

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

PAUL D. CLEMENT
Solicitor General
Counsel of Record
PETER D. KEISLER
Assistant Attorney General
EDWIN S. KNEEDLER
Deputy Solicitor General
JAMES A. FELDMAN
Assistant to the Solicitor General
MARK B. STERN
ALISA B. KLEIN
SCOTT A. HERSHOVITZ
Attorneys
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

MARK A. ROBBINS
General Counsel
KATHIE ANN WHIPPLE
Deputy General Counsel
JAMES S. GREEN
Associate General Counsel
JILL GERSTENFIELD
SUSAN WHITMAN
Attorneys
Office of Personnel Management
Washington, D.C. 20415

QUESTION PRESENTED

Whether federal question jurisdiction exists over a suit by a federal government contractor to enforce a provision in a health benefits plan for federal employees that is part of a government contract under the Federal Employees Health Benefits Act of 1959, 5 U.S.C. 8901 *et seq.*

TABLE OF CONTENTS

Page

Interest of the United States 1
Statement 2
Summary of argument 9
Argument:
I. A carrier's suit for repayment of FEHBA benefits states a federal claim 12
A. Under *Jackson Transit*, a suit to enforce a contract contemplated by a federal statute states a federal claim if congress intended the contractual rights and duties to be federal in nature 12
B. Congress intended that rights and duties under FEHBA contracts be governed by federal law 15
C. FEHBA's preemption provision confirms that federal law governs this suit 19
D. Neither the result in *Jackson Transit* itself nor the result in *Miree* v. *Dekalb County* supports the court of appeals' holding 23
II. Federal law is a necessary element of the carrier's claim. 25
Conclusion 30

TABLE OF AUTHORITIES

Cases:

Abbott Labs. v. *Gardner*, 387 U.S. 136 (1967) 27
American Surety Co. v. *Shulz*, 237 U.S. 159 (1915) 13
Arkansas Dep't of Health & Human Servs. v. *Ahlborn*, cert. granted, No. 04-1506 (Sept. 27, 2005) 29
Ashwander v. *TVA*, 297 U.S. 288 (1936) 22

Cases—Continued: Page

Bell v. *Hood*, 327 U.S. 678 (1946) 14
Blue Cross & Blue Shield v. *Cruz*, 396 F.3d 793 (2005), petition for cert. pending, No. 04-1657 19
Botsford v. *Blue Cross & Blue Shield of Montana, Inc.*, 314 F.3d 390 (9th Cir. 2002) 19
Boyle v. *United Techs. Corp.*, 487 U.S. 500 (1988) 6, 8, 15, 16, 23
Christiansen v. *National Sav. & Trust Co.*, 683 F.2d 520 (D.C. Cir. 1982) 2
City of Chicago v. *International Coll. of Surgeons*, 522 U.S. 156 (1997) 9, 26
Clearfield Trust Co. v. *United States*, 318 U.S. 363 (1943) 15
FMC Corp. v. *Holliday*, 498 U.S. 52 (1990) 20
Franchise Tax Bd. v. *Construction Laborers Vacation Trust*, 463 U.S. 1 (1982) 10
Grable & Sons Metal Prods., Inc. v. *Darue Eng'g & Mfg.*, 125 S. Ct. 2363 (2005) 25, 26, 27, 28, 29, 30
Great-West Life & Annuity Ins. Co. v. *Knudson*, 534 U.S. 204 (2002) 18
Jackson Transit Auth. v. *Local Div. 1285*, 457 U.S. 15 (1982) 9, 10, 12, 13, 14, 21
Jones v. *R.R. Donnelly & Sons Co.*, 124 S. Ct. 1836 (2004) 26
Ingersoll-Rand Co. v. *McClendon*, 498 U.S. 133 (1990) 21
International Ass'n of Machinists v. *Central Airlines, Inc.*, 372 U.S. 682 (1963) 13

Cases—Continued: Page

M'Culloch v. *Maryland*, 17 U.S. (4 Wheat.) 316 (1819) 23
Merrell Dow Pharms. v. *Thompson*, 478 U.S. 804 (1986) 26, 27, 28
Mills v. *Electric Auto-Lite Co.*, 396 U.S. 375 (1970) 13
Miree v. *DeKalb County*, 433 U.S. 25 (1977) 24, 25
Morales v. *TWA*, 504 U.S. 374 (1992) 22
Muratore v. *OPM*, 222 F.3d 918 (11th Cir. 2000) 4
National Ass'n of Postal Supervisors v. *United States*, 21 Cl. Ct. 310 (1990), aff'd, 944 F.2d 859 (Fed. Cir. 1991) 3
Norfolk & W. R.R. v. *Nemitz*, 404 U.S. 37 (1971) 13
Shulthis v. *McDougal*, 225 U.S. 561 (1912) 29
Smith v. *Kansas City Title & Trust Co.*, 255 U.S. 180 (1921) 26
Transamerica Mortgage Advisors, Inc. v. *Lewis*, 444 U.S. 11 (1979) 13
United States v. *County of Allegheny*, 322 U.S. 174 (1944) 10, 15, 16, 18, 23, 26
United States v. *County of Fresno*, 429 U.S. 452 (1978) 10
United States v. *Kaines*, 362 U.S. 17 (1960) 22
Verizon Md., Inc. v. *Public Serv. Comm'n*, 535 U.S. 635 (2002) 27

Constitution, statutes and regulations: Page

U.S. Const.:
Art. I:
§ 8, Cl. 1 (Spending Clause) 22
§ 18, Cl. 18 (Necessary & Proper Clause) 22
Administrative Procedure Act, 5 U.S.C. 701 *et seq.*:
5 U.S.C. 701 4
5 U.S.C. 706 4
Airline Deregulation Act of 1978, Pub. L. No. 95-504, 92 Stat. 1705 22
Employee Retirement Income Security Act of 1974, 29 U.S.C. 1144(a) 20
Federal Employees Health Benefits Act of 1959, 5 U.S.C. 8901 *et seq.* 1, 2
5 U.S.C. 8902 2
5 U.S.C. 8902(a) 4
5 U.S.C. 8902(d) 2
5 U.S.C. 8902(j) 3
5 U.S.C. 8902(m)(1) ..... *passim*
5 U.S.C. 8903 2
5 U.S.C. 8905(a) 2
5 U.S.C. 8906 (2000 & Supp. II 2002) 3
5 U.S.C. 8906(b)(1) 3
5 U.S.C. 8906(b)(2) 3
5 U.S.C. 8906(f) (Supp. II 2002) 3
5 U.S.C. 8907(b) 3, 5
5 U.S.C. 8909(a) 3
5 U.S.C. 8909(b) 3

Statutes and regulations—Continued: Page

5 U.S.C. 8912 27

5 U.S.C. 8913 2

5 U.S.C. 8901-8913 2

Federal Employees Health Care Protection Act of 1998, Pub. L. No. 105-266, § 3(c), 112 Stat. 2366 4

28 U.S.C. 1331 ..... 9, 14

28 U.S.C. 1345 30

49 U.S.C. 1609(c) (1976) 12

5 C.F.R.:

Section 890.105(a)(1) 4

Section 890.301(a) 2

Section 890.503(c)(2) 3

48 C.F.R.:

Section 31-201.5 5

Section 1615.902 3

Section 1631.201-70 5

Section 1632.170(b) 3

Miscellaneous:

60 Fed. Reg. 16,037 (1995) 17

H.R. Rep. No. 957, 86th Cong. 1st Sess. (1959) 2, 16

H.R. Rep. No. 282, 95th Cong., 1st Sess. (1977) 4

H.R. Rep. No. 374, 105th Cong. 1st Sess. (1997) 4, 24

Miscellaneous—Continued: Page

OPM Announces Smallest Average FEHB Premium Increase in Nine Years (Sept. 15, 2005) <http://www. opm.gov/news/opm-announces-smallest-average-FEHB-premium-increase-in-nine-years,961.aspx> 2

Restatement (Second) of Contracts § 309 (1979) 18

In the Supreme Court of the United States

No. 05-200

EMPIRE HEALTHCHOICE ASSURANCE, INC., DBA
EMPIRE BLUE CROSS BLUE SHIELD, PETITIONER

v.

DENISE F. MCVEIGH, AS ADMINISTRATRIX
OF THE ESTATE OF JOSEPH E. MCVEIGH

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

INTEREST OF THE UNITED STATES

Pursuant to the Federal Employees Health Benefits Act of 1959 (FEHBA), 5 U.S.C. 8901 *et seq.*, the United States enters into contracts with carriers to provide health benefits to federal employees, annuitants, and their dependents. The question presented in this case is whether there is federal jurisdiction over a suit by a FEHBA carrier against an enrollee to enforce a term of a FEHBA contract. The federal government has a substantial interest in the uniform enforcement of FEHBA contracts, in the costs of FEHBA, in the terms and conditions of federal employment, and in the welfare of federal employees. At the Court's invitation, the Solic-

itor General filed an amicus brief on behalf of the United States at the petition stage of this case.

STATEMENT

1. Congress enacted the Federal Employees Health Benefits Act of 1959, 5 U.S.C. 8901 *et seq.*, to establish a comprehensive program that would "assure maximum health benefits for employees at the lowest possible cost to themselves and to the Government." H.R. Rep. No. 957, 86th Cong. 1st Sess. 4 (1959). Today, approximately eight million federal employees, retirees, and their dependents receive health insurance through plans under FEHBA, at a total cost of about $31 billion per year in premiums, $22 billion of which is paid by the federal government. *OPM Announces Smallest Average FEHB Premium Increase in Nine Years* (Sept. 15, 2005) <http://www.opm.gov/news/opm-announces-smallest-average-FEHB-premium-increase-in-nine-years,961.aspx>.

FEHBA confers broad authority on the Office of Personnel Management (OPM) to administer the Federal Employees Health Benefits Program, see 5 U.S.C. 8901-8913, and to promulgate regulations necessary to carry out the statute's objectives, see 5 U.S.C. 8913. The statute gives OPM authority to contract with carriers to offer health benefits plans to federal employees, annuitants, and dependents. 5 U.S.C. 8902, 8903. Such plans must meet criteria established by OPM, and each contract must contain "a detailed statement of benefits offered and shall include such maximums, limitations, exclusions, and other definitions of benefits as the Office considers necessary or desirable." 5 U.S.C. 8902(d).

Federal employees may "elect to enroll or not to enroll within 60 days after becoming eligible." 5 C.F.R. 890.301(a); see 5 U.S.C. 8905(a). Employees enroll pursuant to the contract between the carrier and OPM, Pet. App. 3a n.1, and they are bound by the terms of that contract. See *Christiansen* v.

National Sav. & Trust Co., 683 F.2d 520, 530 (D.C. Cir. 1982). Each enrollee must be issued an "appropriate document" setting forth or summarizing the "(1) services or benefits, including maximums, limitations, and exclusions, to which the enrollee or the enrollee and any eligible family members are entitled thereunder; (2) procedure for obtaining benefits; and (3) principal provisions of the plan affecting the enrollee and any eligible family members." 5 U.S.C. 8907(b).

By statute, the government and the enrollee share responsibility for premiums payable to the plan. 5 U.S.C. 8906 (2000 & Supp. II 2002). The employing agency (or OPM for annuitants) pays approximately 75% of the individual plan's premium as part of its payroll costs funded by general appropriations. 5 U.S.C. 8906(b)(1) and (2); 5 U.S.C. 8906(f) (Supp. II 2002). Premiums are deposited into a special fund called the Employees Health Benefits Fund (Fund) in the United States Treasury. 5 U.S.C. 8909(a).

Under the type of fee-for-service plan at issue in this case, the carrier draws against the Fund on a "checks-presented" basis to pay for covered health care services. 5 U.S.C. 8909(a); 48 C.F.R. 1632.170(b). Any balances in the Fund are not the property of the carriers. Rather, a carrier's profit, if any, comes from a negotiated service charge. See *National Ass'n of Postal Supervisors* v. *United States*, 21 Cl. Ct. 310, 315 (1990) ("The service charge is the only profit element of FEHBA. * * * [The] carrier may not make a profit on the premium charges themselves."), aff'd, 944 F.2d 859 (Fed. Cir. 1991); see also 48 C.F.R. 1615.902. Any surplus attributable to a plan may be used, at OPM's discretion, to reduce future government and employee contributions, increase plan benefits, or make a refund to the government and plan enrollees. 5 U.S.C. 8909(b); 5 C.F.R. 890.503(c)(2).

The government ultimately decides whether a claim for medical services should be paid under the program. 5 U.S.C.

8902(j). If a carrier denies payment of a claim, the plan enrollee or other covered individual may seek OPM review. 5 C.F.R. 890.105(a)(1). OPM's final determination regarding the claim is subject to judicial review in federal court under the Administrative Procedure Act, 5 U.S.C. 701, 706. See, *e.g.*, *Muratore* v. *OPM*, 222 F.3d 918, 920 (11th Cir. 2000).

FEHBA includes an express preemption provision, which states that "[t]he terms of any contract under this chapter which relate to the nature, provision, or extent of coverage or benefits (including payments with respect to benefits) shall supersede and preempt any State or local law, or any regulation issued thereunder, which relates to health insurance or plans." 5 U.S.C. 8902(m)(1). The provision was originally enacted "to establish uniformity in Federal employee health benefits and coverage." H.R. Rep. No. 282, 95th Cong., 1st Sess. 1 (1977). It was broadened in 1998, Pub. L. No. 105-266, § 3(c), 112 Stat. 2366, "to strengthen the ability of national plans to offer uniform benefits and rates to enrollees regardless of where they may live," to "strengthen the case for trying FEHB program claims disputes in Federal courts rather than state courts," and to "prevent carriers' cost-cutting initiatives from being frustrated by State laws." H.R. Rep. No. 374, 105th Cong., 1st Sess. § 3, at 9 (1997).

2. The largest plan in the FEHBA program is the Blue Cross Blue Shield Service Benefit Plan. Pursuant to 5 U.S.C. 8902(a), OPM has entered into annual contracts with the Blue Cross Blue Shield Association, acting on behalf of petitioner and other participating local Blue Cross Blue Shield affiliates. The contract provides that "[b]y enrolling or accepting services under this contract, [enrollees and their eligible dependents] are obligated to all terms, conditions, and provisions of this contract." J.A. 90.

The contract also provides that "[t]he Carrier shall provide the benefits as described in the Certified Brochure Text

found in Appendix A," J.A. 89, and that "[t]he Carrier's subrogation rights, procedures, and policies, including recovery rights, shall be in accordance with the Certified Brochure Text," J.A. 100. The Certified Brochure Text is identical, other than in format, to the Statement of Benefits supplied to each enrollee. See 5 U.S.C. 8907(b). Indeed, the Certified Brochure Text recites that it "is based on text incorporated into the contract between OPM and [the carrier]." J.A. 128.

The Statement of Benefits has a reimbursement provision requiring plan participants to repay benefits if they receive compensation from a third party for an injury or illness for which benefits were paid.[1] If the participant does not voluntarily reimburse the plan, the contract requires the carrier to make a "reasonable effort to seek recovery of amounts to which it is entitled to recover in cases which are brought to its attention," and to "subrogate under a single, nation-wide policy to ensure equitable and consistent treatment for all Members under the contract," J.A. 95. Amounts received as reimbursement must be credited to the Treasury Fund, either through a cost reduction or a cash refund to the Fund. See 48 C.F.R. 31-201.5, 1631.201-70; see also C.A. App. A876-A877 ¶ 7.

---

[1] The provision states in relevant part:

> If another person or entity . . . causes you to suffer an injury or illness, and if we pay benefits for that injury or illness, you must agree to the following:
>
> All recoveries you obtain (whether by lawsuit, settlement, or otherwise), no matter how described or designated, must be used to reimburse us in full for benefits we paid. Our share of any recovery extends only to the amount of benefits we have paid or will pay to you or, if applicable, to your heirs, administrators, successors, or assignees.

Pet. App. 4a.

3. Joseph E. McVeigh was an enrollee in the FEHBA plan administered by petitioner. McVeigh suffered injuries in an automobile accident in 1997 and received approximately $157,309 in FEHBA benefits prior to his death in 2001. In 2003, respondent Denise McVeigh (as administratrix of McVeigh's estate) recovered $3,175,000 in settlement of the estate's tort suit arising out of the accident. Pet. App. 3a.

When it learned of the settlement, petitioner sought reimbursement for the benefits it had provided to McVeigh. Respondent agreed to place $100,000 in escrow pending litigation. See Pet. App. 3a. In April 2003, petitioner commenced this action against respondent in the United States District Court for the Southern District of New York, seeking reimbursement of the $157,309 in benefits it had paid. See *ibid.* The complaint invoked the district court's federal question jurisdiction, alleging that the "action is founded on [FEHBA]; on federal contracts and regulations established pursuant to FEHBA; and on federal common law." J.A. 41. The complaint sought declaratory relief, a judgment for $157,309, and orders requiring respondent to pay the $100,000 in escrow and an additional $57,309 to petitioner. J.A. 47. The district court granted respondent's motion to dismiss the complaint for lack of subject matter jurisdiction. Pet. App. 54a-62a.

4. a. A divided panel of the court of appeals affirmed, holding that "[petitioner's] claims are breach-of-contract claims arising under state law." Pet. App. 24a. Because FEHBA does not provide an express statutory cause of action for a carrier suit against an enrollee, the court concluded that "federal jurisdiction exists over this dispute only if federal common law governs [petitioner's] claims." *Id.* at 5a. Citing and quoting *Boyle* v. *United Technologies Corp.*, 487 U.S. 500, 507 (1988), the court stated that federal common law governs only when "the operation of state law would (1) significant[ly] conflict with (2) uniquely federal interests." Pet. App. 6a.

The court did not dispute petitioner's contention that its reimbursement action "directly affects the United States Treasury and the cost of providing health benefits to federal employees." Pet. App. 6a. The court also did not dispute petitioner's contention that "Congress has expressed its interest in maintaining uniformity among the states with respect to the benefits of its health plans." *Ibid.* The court concluded, however, that petitioner failed to show that the operation of New York state law creates 'an actual, significant conflict' with those interests." *Id.* at 6a-7a. In the court's view, the fact that "uncertainties associated with the application of state law 'might'" impose fiscal costs on the federal government and the fact that "enrollees in some states 'might' successfully avoid reimbursement while others would have to repay" were "speculations" that "do not suffice to satisfy the conflict prong of *Boyle*." *Id.* at 7a.

The court also rejected the suggestion that federal question jurisdiction exists by virtue of FEHBA's preemption provision, 5 U.S.C. 8902(m)(1), which provides that "[t]he terms of any contract under [FEHBA] which relate to the nature, provision, or extent of coverage or benefits (including payments with respect to benefits)" preempt "any State or local law * * * which relates to health insurance or plans." Pet. App. 10a & n.5. The court found "highly problematic" constitutional difficulties were raised by the fact that Section 8902(m)(1)'s "plain language differs from typical preemption provisions by unambiguously providing for preemption by contract," rather than preemption by federal statutory or common law. *Id.* at 11a. The court concluded that Section 8902(m)(1) could be saved by narrowly construing it to require that "[t]he federal law preempting state law may be federal common law or the FEHBA statute provisions themselves, but it must be law—not contract terms." *Id.* at 14a.

The court's ultimate holding on preemption, however, did not concern any distinction under Section 8902(m)(1) between federal contract terms and federal statutory or common law. Instead, opining that "the presumption against federal preemption * * * should guide our analysis," Pet. App. 15a, the court offered a narrow view of the preemption provision in a different respect. Addressing the clause providing that Section 8902(m)(1) preempts only state laws that "relate[] to health insurance or plans," the court held that there was no showing that the dispute in this case "implicates a specific state law or state common-law principle" that "relate[s] to health insurance" under Section 8902(m)(1). *Id.* at 15a.

b. Judge Sack concurred, acknowledging that petitioner had "made a substantial showing that * * * this case implicates 'uniquely federal interests.'" Pet. App. 25a (quoting *Boyle*, 487 U.S. at 504). He suggested that if, in a future case, a carrier could identify significant ways in which state law would conflict with the policies underlying FEHBA, federal question jurisdiction would exist. See *ibid.*

c. Judge Raggi dissented. See Pet. App. 27a-45a. She explained that "FEHBA contracts are enforceable through common-law breach of contract actions." *Id.* at 29a-30a. In her view, because petitioner brought this action and in its pleadings "relies exclusively upon federal law," the court needed to decide "only whether federal common law does in fact govern claims to enforce rights under a FEHBA plan." *Id.* at 34a. She concluded that it does, explaining that FEHBA's preemption provision contemplates that the terms of a FEHBA plan "will uniformly be construed and enforced according to federal common law," *id.* at 44a.

5. Petitioner filed a petition for panel rehearing and rehearing *en banc*. In an amicus brief filed in support of the petition, the United States argued that federal jurisdiction exists in this case, both because the claim is based on a fed-

eral cause of action under the analysis in *Jackson Transit Authority* v. *Local Division 1285*, 457 U.S. 15, 22 (1982), and because federal law is in any event a "necessary element" of petitioner's claim, see *City of Chicago* v. *International Coll. of Surgeons*, 522 U.S. 156 (1997). Pet. App. 72a-76a.

In an opinion denying panel rehearing, the court acknowledged that the "critical factor" in the *Jackson Transit* analysis congressional intent. Pet. App. 48a. In the court's view, FEHBA's preemption provision "addresses the extent to which federal law will govern FEHBA-related claims" and establishes that state law controls. *Id.* at 48a-49a. The court also rejected the contention that federal law is a "necessary element" of petitioner's claim for relief, although the court provided no separate analysis of that point. *Id.* at 49a n.4. Finally, the court stated that its "discussion of the constitutional difficulties inherent in a literal reading of § 8902(m)(1) was not an essential component of [its] holding that § 8902(m)(1) does not authorize jurisdiction." *Id.* at 49a. The court stated that even if the provision "posed no constitutional concern," its analysis of the "relates to health insurance or plans" language "makes clear that the provision does not create jurisdiction here." *Id.* at 49a-50a. The court concluded that "[r]econsideration of the constitutional issue therefore could not affect the outcome of the case." *Id.* at 50a.

Judge Raggi noted that she would vote to grant rehearing for the reasons stated in her original dissent. Pet. App. 51a. The petition for rehearing *en banc* was denied without opinion. *Id.* at 52a-53a.

SUMMARY OF ARGUMENT

Under long-familiar principles, a case "arises under federal law" within the meaning of 28 U.S.C. 1331 if "a well-pleaded complaint establishes either that federal law creates the cause of action or that the plaintiff's right to relief neces-

sarily depends on resolution of a substantial question of federal law." *Franchise Tax Bd.* v. *Construction Laborers Vacation Trust*, 463 U.S. 1, 27-28 (1982). Under either of those alternatives, this case arises under federal law.

1. *Jackson Transit Authority* v. *Local Division 1285*, 457 U.S. 15 (1982), presented the question whether a suit to enforce a contract contemplated by a federal statute states a federal claim. The Court held that, if Congress intended "that the rights and duties contained in th[e] contracts be federal in nature," then suits to enforce them "state[] federal claims" and may be brought in federal court. *Id.* at 23.

Suits to enforce FEHBA contract terms may be brought in federal court, because Congress clearly intended the rights and duties in FEHBA contracts to be federal in nature. The government is a party to a FEHBA contract, and it has long been settled that construction of government contracts presents "questions of federal law not controlled by the law of any State." *United States* v. *County of Allegheny*, 322 U.S. 174, 183 (1944), limitation on other grounds recognized, *United States* v. *County of Fresno*, 429 U.S. 452, 462 n.10 (1978).

The structure of FEHBA leads to the same conclusion. The federal government has an overwhelming interest in attracting able workers to the federal workforce and, therefore, in the terms and conditions of federal employment, including the FEHBA program. The government has a similarly substantial interest in the health and welfare of the federal workers upon whom it relies to carry out its functions. In addition, the federal government has a direct financial interest in the operation of the FEHBA program and, specifically, in the reimbursement provisions of a FEHBA contract. Petitioner paid the benefits in this case out of a fund in the United States Treasury, and reimbursements are likewise credited to that fund. Indeed, because the carrier's profits are based solely on a negotiated service charge, the United States—and

not the carrier—is the sole beneficiary of a successful reimbursement action. FEHBA's preemption provision, which broadly preempts state laws that affect "benefits" or "payments with respect to benefits" under FEHBA, 5 U.S.C. 8902(m)(1), further reinforces the conclusion that Congress intended the rights and obligations under FEHBA contracts to be entirely federal in nature. Accordingly, there is federal jurisdiction over disputes concerning those rights.

II. Federal jurisdiction also lies in this case because, even if the Court concludes that it is necessary to look to state law to supply the cause of action, all elements of the claim on the merits are nonetheless federal in character. The case seeks to enforce the terms of a government contract whose construction and application is governed wholly by federal law.

Recognizing federal jurisdiction over suits to enforce the reimbursement or other provisions of FEHBA contracts would not disturb Congress's approved balance between state and federal judicial remedies. Congress should be presumed to be aware of the basic rule that the validity and construction of federal contracts present questions of federal law, and FEHBA's preemption provision confirms that understanding. Congress therefore would have assumed that federal courts would have jurisdiction over suits to enforce FEHBA contracts. Indeed, the congressionally approved federal-state balance would be upset by requiring suits to enforce FEHBA contracts to be litigated in *state* courts.

The federal issues are actually disputed and substantial. The case was decided on respondent's motion to dismiss petitioner's complaint. In those circumstances, unless the pleadings demonstrate a narrower scope of dispute, a court should assume that respondent disputes petitioner's assertions that federal law entitles it to relief. Moreover, all of the significant legal issues that could arise would likely involve the con-

struction and application of a FEHBA contract, and they would therefore present substantial questions of federal law.

ARGUMENT

I. A CARRIER'S SUIT FOR REPAYMENT OF FEHBA BENEFITS STATES A FEDERAL CLAIM

A. Under *Jackson Transit*, A Suit To Enforce A Contract Contemplated By A Federal Statute States A Federal Claim If Congress Intended The Contractual Rights And Duties To Be Federal In Nature

Where Congress has enacted a statute that contemplates the formation of contracts, this Court has explained that the question whether suits to enforce such contracts arise under federal law turns on whether Congress intended that the rights and duties arising from the contracts be federal in nature. If Congress intended that those rights and duties be federal, then a suit under the contract arises under federal law.

Under the statute at issue in *Jackson Transit Authority* v. *Local Division 1285*, 457 U.S. 15 (1982), a state or local government, as a condition of receiving federal assistance for acquisition of a private transit company, was required to make "fair and equitable arrangements * * * to protect the interests of employees affected by such assistance," including "the preservation of rights * * * under existing collective bargaining agreements." *Id.* at 17-18 & n.2 (quoting 49 U.S.C. 1609(c) (1976)). A local government that received federal funds for acquiring a private bus company entered into a contract with its employees under that provision. When the local government later attempted to terminate the contract, the union filed suit in federal court, alleging, *inter alia*, that the company had violated the federal statute and the collective-bargaining agreement. *Id.* at 19. The question presented was

whether there was federal jurisdiction over the union's claims. *Jackson Transit*, 457 U.S. at 19.

The Court concluded in *Jackson Transit* that, because the statute "contemplates" contracts between local governments and their unions, "it is reasonable to conclude that Congress expected [those contracts], like ordinary contracts, to be enforceable by private suit upon a breach." 457 U.S. at 20-21. The availability of a federal forum for such a suit, however, turned on whether the suit would be federal or state in nature—*i.e.*, "whether Congress intended" actions under the transit contracts "to set forth federal, rather than state, claims." *Id.* at 21; see *ibid.* ("precise question" is "whether the union's contract actions are federal causes of action").

The Court explained that the absence of an express cause of action in the statute does not establish that Congress intended to foreclose one, because "on several occasions the Court has determined that a plaintiff stated a federal claim when he sued to vindicate contractual rights set forth by federal statutes, despite the fact that the relevant statutes lacked express provisions creating federal causes of action." 457 U.S. at 22 (citing *International Ass'n of Machinists* v. *Central Airlines, Inc.*, 372 U.S. 682, 692 (1963) (a contract made pursuant to a federal statute "has * * * the imprimatur of the federal law upon it" and is therefore "enforceable by federal law, in the federal courts."); *Norfolk & W. R.R.* v. *Nemitz*, 404 U.S. 37 (1971); *Transamerica Mortgage Advisors, Inc.* v. *Lewis*, 444 U.S. 11, 18-19 (1979); *Mills* v. *Electric Auto-Lite Co.*, 396 U.S. 375 (1970); and *American Surety Co.* v. *Shulz*, 237 U.S. 159 (1915)). Those cases, the Court continued, "demonstrate that suits to enforce contracts contemplated by federal statutes may set forth federal claims and that private parties in appropriate cases may sue in federal court to enforce contractual rights created by federal statutes." *Jackson Transit*, 457 U.S. at 22. The "critical factor"

in determining whether such suits set forth federal claims is the "congressional intent behind the particular provision at issue." *Ibid.* If Congress intended that the contracts under the statute "be creations of federal law" and "that the rights and duties contained in those contracts be federal in nature," then suits under the contracts "state[] federal claims." *Id.* at 23. If not, such suits "present[] only state-law claims." *Ibid.*

Applying that analysis in *Jackson Transit* itself, the Court concluded that the contract was governed by state law. The court noted that "labor relations between local governments and their employees are the subject of a longstanding statutory exemption from the National Labor Relations Act" and that the transit funding statute "evinces no congressional intent to upset the decision in the National Labor Relations Act to permit state law to govern the relationships between local governmental entities and the unions representing their employees." 457 U.S. at 23-24. In addition, the Court's review of the legislative history of the transit statute made it "absolutely clear that [Congress] did not intend to create a body of federal law applicable to labor relations between local governmental entities and transit workers," *id.* at 27. The court thus held that the union's claim was not based on a federal cause of action, and that Congress had intended the contracts required by the transit funding statute "to be governed by state law applied in state court." *Id.* at 29.[2]

---

[2] The Court observed that, strictly speaking, the district court had *jurisdiction* under 28 U.S.C. 1331 to hear the union's suit, because it alleged a violation of the agreement contemplated by the transit funding statute and prayed for relief under federal law, and because the union's asserted federal claims were not "wholly insubstantial and frivolous." 457 U.S. at 21 n.6 (quoting *Bell* v. *Hood*, 327 U.S. 678, 681 (1946)). "Thus," the Court concluded, "the District Court had jurisdiction for the purposes of determining whether the union stated a cause of action on which relief could be granted." *Ibid.* On similar reasoning, the district court had jurisdiction here. And for the reasons stated in the text, petitioner does have a cause of action under federal law.

B. Congress Intended That Rights And Duties Under FEHBA Contracts Be Governed By Federal Law

Under the *Jackson Transit* analysis, the rights and duties created by FEHBA contracts are federal in nature. That is generally true of rights and obligations under *any* contract to which the federal government is a party. It is particularly true of FEHBA contracts, given the paramount and pervasive federal interest in FEHBA and the lack of any evidence that Congress intended state law to play any role in defining FEHBA benefits or construing FEHBA contracts. While the statutory structure implicated by *Jackson Transit* included a clear contrary indication in the NLRA's "anti-preemption" provision for local governments, FEHBA includes an equally clear reinforcing indication in its preemption provision. An action to enforce a FEHBA contract thus sets forth a federal claim, and it arises under federal law.

1. It has long been settled that "[t]he validity and construction of contracts through which the United States is exercising its constitutional functions, their consequences on the rights and obligations of the parties, the titles or liens which they create or permit, all present questions of federal law not controlled by the law of any State." *County of Allegheny*, 322 U.S. at 183 (citing cases); *Clearfield Trust Co.* v. *United States*, 318 U.S. 363, 366-367 (1943); cf. *Boyle*, 487 U.S. at 504 ("[O]bligations to and rights of the United States under its contracts are governed exclusively by federal law."). A FEHBA contract is a federal contract through which the United States exercises its power to provide for a federal workforce to carry out its other constitutional functions. A FEHBA contract therefore addresses the "uniquely federal interests," *ibid.*, in the relationship between the United States and its employees, through whom the United States pursues its fundamental "interest in getting the Govern-

ment's work done," *id.* at 505. Moreover, the reimbursement clause at issue here inures directly to the benefit of the Treasury. Accordingly, the rights and duties created by a FEHBA contract "present questions of federal law not controlled by the law of any State." *Allegheny County*, 322 U.S. at 183. Although Congress could provide that state law governs particular rights and duties under a federal contract, it has not done so here.

2. An examination of the FEHBA program reinforces the distinctly federal nature of the rights and duties under a FEHBA contract. Because the government's ability to hire and retain employees is a prerequisite to its ability to carry out all of its other constitutional functions, the establishment, organization, and governance of the federal workforce is a core function of the federal government. The federal government has a self-evident interest in the terms and conditions of federal employment, because it depends on attracting able employees to the federal workforce. Moreover, FEHBA contracts serve to maintain the health of the federal workforce. The federal government has a great interest in the health and welfare of those upon whom it relies to carry out its functions.

The FEHBA program was established to serve those interests. It was designed as a part of the compensation package offered to federal employees, in an effort to "bring the Government abreast of most private employers" and to "improv[e] the competitive position of the Government with respect to private enterprise in the recruitment and retention of competent civilian personnel." H.R. Rep. No. 957, 86th Cong. 1st Sess. 2 (1959). It was also based on a "recognition on the part of the public that both basic health and major medical insurance coverages are essential to protect wage-earners and their families." *Id.* at 2. FEHBA's ultimate goal is "to facilitate and strengthen the administration of the activities of the government generally." *Id.* at 1.

The mechanics of the FEHBA program also reflect the strength and pervasiveness of the federal interest. Benefit payments derive from accounts that are funded and administered by the United States and maintained on the books of the United States Treasury. See p. 3, *supra*. Benefit determinations under the plans established by the contracts between OPM and carriers are made by the carrier in the first instance, but are subject to administrative review by OPM and to judicial review in an APA action against OPM, not a suit against the private carrier. See pp. 3-4, *supra*. In promulgating regulations in 1995 to clarify the administrative and judicial procedure for review of claims, OPM explained that "[h]ealth insurance contracts under the FEHB Program are federal contracts under 5 U.S.C., Chapter 89," and that, "[a]ccordingly, legal actions concerning disputes arising or relating to those contracts are controlled by federal, rather than State law." 60 Fed. Reg. 16,037 (1995).

The federal government has a direct interest in any action brought by the United States or a carrier to enforce the contract, particularly a reimbursement action like this case. Any repayment of benefits pursuant to a reimbursement clause such as the one at issue in this case must be credited to the Treasury account. FEHBA carriers have no property interest in any balance remaining in the Treasury fund after benefits are paid out and reimbursements received. Any surplus may be used by the government, at OPM's discretion, to lower future rates, reduce future government and employee contributions, increase plan benefits, or make a refund to the government and plan enrollees. See p. 3, *supra*. Accordingly, the carrier has no direct stake in a reimbursement suit, although it fulfills a contractual obligation to the government. The proceeds of the suit belong to the United States.

In short, there is a strong federal connection with and interest in all aspects of the FEHBA program. Those fea-

tures strongly reinforce the applicability of the general rule that the rights and obligations created by contracts entered into by the federal government are federal in nature. Under the *Jackson Transit* analysis, a suit to enforce a term in a FEHBA contract therefore states a federal claim.

3. Although the United States is not a party to this suit, petitioner's claim plainly seeks to enforce a term in a FEHBA contract. FEHBA carriers are obligated under their contracts with the government to provide health benefits to FEHBA enrollees and their eligible dependents. See Pet. App. 3a n.1. Conversely, FEHBA enrollees and those who accept FEHBA benefits are subject to the conditions on those benefits stated in the contract between the carrier and the government. See J.A. 90 ("By enrolling or accepting services under this contract, [participants] are obligated to all terms, conditions, and provisions of this contract."); see also Restatement (Second) of Contracts § 309 cmt. (c) (1979) ("The conduct of the beneficiary, * * * like that of any obligee, may give rise to claims and defenses which may be asserted against him by the obligor.").[3] One of the condi-

---

[3] The right to reimbursement that petitioner seeks to enforce arises from the FEHBA contract. The most accurate way to describe the relationship between the parties is that the FEHBA participant is a third-party beneficiary of the FEHBA contract, and his conduct in enrolling in FEHBA or accepting FEHBA benefits has subjected him and his eligible dependents to the reimbursement condition. Alternatively, however, the same result would follow if (a) the participant were viewed as having entered into an independent contract, committing him to make reimbursement, when enrolling in a FEHBA plan or accepting benefits, or (b) the action is viewed as an action for restitution (legal and/or equitable) for sums withheld in violation of the terms of the FEHBA contract, see *Great-West Life & Annuity Ins. Co.* v. *Knudson*, 534 U.S. 204, 213 (2002); *County of Allegheny*, 322 U.S. at 183 ("the titles *or liens* which [federal contracts] create or permit * * * present questions of federal law") (emphasis added). Cf. *Sereboff* v. *Mid-Atlantic Medical Servs., Inc.*, No. 05-260 (to be argued Mar. 28, 2006). For present purposes, what is important

tions to which participants are subject is the reimbursement provision, which requires that all tort recoveries "must be used to reimburse [the carrier] in full for benefits [the carrier] paid." Pet. App. 4a. And the carrier is obligated under the FEHBA contract to pursue reimbursement claims against participants, although the direct benefits of any recovery flow to the United States. See J.A. 19. Because this case is a suit to enforce provisions in the FEHBA contract between OPM and the carrier, petitioner's complaint states a federal claim.

C. FEHBA's Preemption Provision Confirms That Federal Law Governs This Suit

1. Congress's intent that rights and duties under a FEHBA contract be federal in nature is strongly reinforced by FEHBA's preemption provision, 5 U.S.C. 8902(m)(1). As its history makes clear, see p. 4, *supra*, Section 8902(m)(1) was designed to ensure that "[f]ederal employees in different states would [not] have different reimbursement obligations and hence different net benefits," a result that would be "contrary to the uniformity goal of FEHBA in general and its preemption provision in particular." *Blue Cross & Blue Shield* v. *Cruz*, 396 F.3d 793, 799 (7th Cir. 2005), petition for cert. pending, No. 04-1657; see Pet. App. 34a-44a (Raggi, J., dissenting); *Botsford* v. *Blue Cross & Blue Shield of Montana, Inc.*, 314 F.3d 390, 394 (9th Cir. 2002).

Section 8902(m)(1) mandates that FEHBA contract provisions that "relate to the nature, provision, or extent of coverage or benefits (including payments with respect to benefits) shall supersede and preempt any State or local law or any regulation issued thereunder, which relates to health insurance or plans." 5 U.S.C. 8902(m)(1). By virtue of Section 8902(m)(1), any state law that purports to limit, expand, or in

---

is that Congress intended that the provisions in a federal FEHBA contract be enforceable, and this is an action to enforce them.

any way affect coverage or benefits (or payments with respect to benefits) under FEHBA plans is preempted. Even apart from the fact that state law concerning the reimbursement issue would be preempted by this provision, the preemption provision reinforces the pervasively federal nature of the underlying contracts for purposes of the *Jackson Transit* analysis. But there is no doubt that the reimbursement provisions of FEHBA contracts in particular have preemptive force under Section 8902(m)(1), and their preemptive force displaces state laws that would affect the right to reimbursement. FEHBA contract terms that require reimbursement "relate to the * * * extent of coverage or benefits" (because they limit benefits by requiring reimbursement from any tort recovery) and they specifically "relate to * * * payments with respect to benefits" (because they require such payments to be returned to the carrier under the specified circumstances). Any state laws that would affect reimbursement rights "relate to health insurance or plans," because they would affect the plan's rights to reimbursement under the FEHBA contract. Cf. *FMC Corp.* v. *Holliday*, 498 U.S. 52, 58-60 (1990) (state statute barring subrogation or reimbursement from claimant's tort recovery, is covered by ERISA's preemption clause, 29 U.S.C. 1144(a), because it "relate[s] to" ERISA plan).

Because there can be no state law to apply, it follows that reimbursement must be governed by *federal* law, including FEHBA itself, the terms of the FEHBA contracts, and federal common law where necessary to fill in the interstices. In short, Section 8902(m)(1) unambiguously confirms that the rights and obligations under FEHBA contracts are governed by federal law. Under *Jackson Transit*, that is sufficient to establish that a suit to enforce those rights or obligations states a federal claim. The preemption provision reinforces the federal nature of those suits, just as the "anti-preemp-

tion" policy of the NLRA pointed in the opposite direction in *Jackson Transit*.

2. The court of appeals committed two errors in addressing Section 8902(m)(1). First, it misapprehended the significance of Section 8902(m)(1) in this case. Second, its statement that the provision is "highly problematic, and probably unconstitutional," Pet. App. 11a, is erroneous.

a. The court misapprehended the significance of Section 8902(m)(1) in stating that "[w]ithout any showing that the dispute [in this case] implicates a specific state law or state common-law principle 'relat[ing] to health insurance,' § 8902(m)(1) does not authorize federal preemption of state law in this case." Pet. App. 15a. Here, Section 8902(m)(1) *categorically* ousts state law in the field of health insurance or plans, leaving no state law to apply.

Moreover, the *Jackson Transit* analysis does not turn on whether the plaintiff can identify a particular provision of state law that would be applicable to a particular federal contract and would be preempted. Instead, under *Jackson Transit*, the existence of a federal claim turns on whether Congress intended that "the rights and duties contained in * * * contracts [contemplated by FEHBA] be federal in nature." 457 U.S. at 23. The breadth of Section 8902(m)(1) confirms what would follow in any event from an analysis of the rest of the FEHBA scheme: that the federal interest in rights and duties under FEHBA contracts is predominant and pervasive, that there is nothing to suggest that Congress intended state law to have any role in the FEHBA scheme, and that the rights and duties under FEHBA contracts—especially rights and duties having to do with benefits and payments with respect to benefits—are therefore "federal in nature."

The court of appeals recognized that this Court has construed the term "relates to" in other preemption provisions "quite broadly." Pet. App. 18a. See, *e.g.*, *Ingersoll-Rand Co.*

v. *McClendon*, 498 U.S. 133, 139 (1990) (concluding in ERISA case that "a state law may 'relate to' a benefit plan, and thereby be pre-empted, even if the law is not specifically designed to affect such plans, or the effect is only indirect"); *Morales* v. *TWA*, 504 U.S. 374, 383 (1992) (concluding that words "relating to" in the Airline Deregulation Act of 1978, Pub. L. No. 95-504, 92 Stat. 1705, "express a broad pre-emptive purpose"). The court concluded, however, that it should adopt a narrower interpretation of FEHBA's preemption provision, see Pet. App. 19a-20a, thus leaving more scope for state law under FEHBA. That was error. ERISA regulates the benefits plans that private employers offer their employees. FEHBA governs the health benefit plans that the federal government provides its own employees. It is exceedingly unlikely that Congress intended a broader role for state law in the case of federal employees, relative to private employees.

b. As to the court's constitutional doubts, there is no basis for any doubt about the constitutionality of Section 8902(m)(1) when it is given the comprehensive construction its express terms require.[4] FEHBA is a valid exercise of Congress's power under the Spending Clause, U.S. Const. Art. I, § 8, Cl. 1, to provide for the maintenance of the Federal Government itself, as well as its power under the Necessary and Proper Clause, Art. I, § 8, Cl. 18. A FEHBA contract is a government contract, made pursuant to federal statute and regulations. Congress may provide that state law has no role in the

---

[4] It was in any event inappropriate for the court to address questions about the constitutionality of a federal statute in a case where the court's result in the end did not hinge on those doubts or their resolution. See Pet. App. 49a-50a; *United States* v. *Raines*, 362 U.S. 17, 21 (1960); *Ashwander* v. *TVA*, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring) ("[I]f a case can be decided on either of two grounds, one involving a constitutional question, the other a question of statutory construction or general law, the Court will decide only the latter").

construction or application of such a contract. *M'Culloch* v. *Maryland*, 17 U.S. (4 Wheat.) 316, 427 (1819) ("It is the very essence of supremacy * * * to modify every power vested in subordinate governments, as to exempt its own operations from their own influence."). Indeed, it is long established that the terms of a government contract may be governed by federal common law (and thus displace state law) just as surely as if those terms were reflected in a statute or regulation. See, *e.g.*, *Boyle*, 487 U.S. at 512 (finding preemption based on conflict between state law and the terms of a federal procurement contract); *County of Allegheny*, 322 U.S. at 183 (holding that the terms of a federal contract under which machinery in a private factory would be property of the United States preempted state laws under which factory owner would have been found to own the machinery).

D. Neither The Result In *Jackson Transit* Itself Nor The Result In *Miree* v. *DeKalb County* Supports The Court Of Appeals' Holding

1. The Court's holding in *Jackson Transit* itself, that the contract between the municipality and the union in that case was governed by state law, casts no doubt on the conclusion that a FEHBA contract is governed by federal law. First, although the federal funding statute in *Jackson Transit* required the formation of the contract as a condition of receiving funds, the federal government itself was not a party to the contract. The federal government is a party to a FEHBA contract. Second, the result in *Jackson Transit* turned on an "anti-preemption" provision in a separate statute making clear Congress's intent that contracts between municipalities and their unions should be governed by state, not federal, law, and on legislative history showing clearly that state law should govern. There is no federal law or legislative history demonstrating that Congress intended that the rights and

duties under FEHBA contracts should be governed by state, not federal, law; to the contrary, the preemption provision in FEHBA itself makes it clear that such contracts are governed by federal law, and the legislative history of that provision shows that it was enacted to promote uniformity under national benefit plans and "to strengthen the case for trying FEHB program claims disputes in federal courts rather than State courts." H.R. Rep. No. 374, *supra*, at 9. Finally, the federal government's ongoing interests in most of the rights and duties created by the contract between the municipality and the union in *Jackson Transit* were minimal. The federal government's interests in the rights and duties created by a FEHBA contract—and in their uniform application throughout the country—are predominant and pervasive. Indeed, the federal government, not the carrier, would be the direct beneficiary of any recovery in the suit.

2. In its opinion on the petition for rehearing, the court of appeals also sought support (Pet. App. 49a) in this Court's decision in *Miree* v. *DeKalb County*, 433 U.S. 25, 30 (1977). In that case, a contract between the Federal Aviation Administration (FAA) and the County required the County to restrict land adjacent to an airport to uses compatible with airport operations. Certain parties who were the victims of an airplane accident sued the County in a diversity action in federal court, alleging that the accident was caused by the County's breach of the provision in its contract with the FAA and that they were third-party beneficiaries entitled to enforce that provision. This Court held that state law, not federal law, governed the question "whether private parties may, as third-party beneficiaries, sue a municipality for breach of the FAA contracts." *Id.* at 32.

Miree does not support the court of appeals' holding here. *Miree* involved only the "narrow" question, 433 U.S. at 29, whether state or federal law governed the question of third-

party beneficiary status in a diversity case otherwise properly brought in federal court, where the federal contract said nothing about any such beneficiary. By contrast, this case involves enforcement for the benefit of the United States of a right to reimbursement from a third-party beneficiary that is an express provision in a FEHBA contract and that implicates the core subject matter of the contract. In addition, the Court concluded in *Miree* that "[t]he operations of the United States" would not "be burdened or subjected to uncertainty" by "variant state-law interpretations" on the narrow question of third-party beneficiary status. *Id.* at 30. Indeed, the Court relied on the fact that resolution of that question would "have no direct effect upon the United States or its Treasury." *Id.* at 29. By contrast, the "operations" and financial interests of the United States are closely tied to the uniform construction and application of the rights and duties created by FEHBA contracts—and, in particular, to the reimbursement provisions in those contracts. Although the government's interests in *Miree* were "too speculative" and "far too remote * * * to justify the application of federal law," *id.* at 32-33, the government's interests in the rights and duties created under FEHBA contracts and their reimbursement provisions are direct, clear, and substantial. They are far more than sufficient to require the application of federal law.

II. FEDERAL LAW IS A NECESSARY ELEMENT OF THE CARRIER'S CLAIM.

Although "federal-question jurisdiction is invoked by and large by plaintiffs pleading a cause of action created by federal law," there is "another longstanding, if less frequently encountered, variety of federal 'arising under' jurisdiction." *Grable & Sons Metal Prods., Inc.* v. *Darue Eng'g & Mfg.*, 125 S. Ct. 2363, 2366-2367 (2005). Thus, "a claim arises under federal law if federal law provides a necessary element of the

plaintiff's claim for relief." *Jones* v. *R.R. Donnelley & Sons Co.*, 124 S. Ct. 1836, 1842 (2004). In *Grable*, for example, the Court explained that where "a state-law claim necessarily raise[s] a stated federal issue, actually disputed and substantial, which a federal forum may entertain without disturbing any congressionally approved balance of federal and state judicial responsibilities," then federal jurisdiction is warranted. 125 S. Ct. at 2368. See *City of Chicago* v. *International Coll. of Surgeons*, 522 U.S. 156 (1997); *Merrell Dow Pharms., Inc.* v. *Thompson*, 478 U.S. 804, 808-809 (1986); *Smith* v. *Kansas City Title & Trust Co.*, 255 U.S. 180 (1921). Petitioner's claim for reimbursement arises under federal law on this basis as well.

1. Even if this Court determined that petitioner's claim is not based on a federal cause of action, it nonetheless would necessarily raise a federal issue. Petitioner's complaint attempts to enforce the reimbursement provision in petitioner's contract with the government; it invokes a federal statute (FEHBA), a federal contract, and federal common law. Any question concerning the interpretation or application of the reimbursement provision necessarily presents a question of federal law. That is because, as explained above, the validity and construction of a federal contract necessarily present questions of "federal law not controlled by the law of any State." *County of Allegheny*, 322 U.S. at 183. Any divergence from that time-honored principle in this case would not be warranted, because, as also explained above, the federal government has an overriding interest (and the States have no interest) in the FEHBA program and in its uniform application across the country. Further, the pervasive federal interest in matters arising under FEHBA contracts is expressly confirmed by FEHBA's preemption provision, which establishes that state law has no role in resolving questions

about benefits and payments for benefits under the FEHBA program. See pp. 15-18, 19-22, *supra*.

2. Recognizing federal jurisdiction in this case would not "disturb[] any congressionally approved balance of federal and state judicial responsibilities." *Grable*, 125 S. Ct. at 2363. Congress has never suggested that FEHBA contract disputes should be litigated in state court, and there is no longstanding history of state-court resolution of FEHBA disputes. To the contrary, Congress should be presumed to have been aware of the settled principle that federal contracts are construed and applied in accordance with federal law, and FEHBA's preemption provision confirms that understanding. Congress therefore would have assumed that federal courts would be open to suits under FEHBA contracts, and indeed that was one of the reasons for the expansion of the preemption provision in 1998. See p. 4, *supra*.[5]

This case is also poles apart from *Merrell Dow Pharmaceuticals Inc.* v. *Thompson*, 478 U.S. 804 (1986), in which recognizing federal jurisdiction would have disturbed the federal-state balance intended by Congress. See *Grable*, 125 S. Ct. at 2369-2370. In *Merrell Dow*, the Court held that federal jurisdiction did not lie over plaintiff's state-law tort claim against a drug company alleging that the firm's violation of federal misbranding prohibitions constituted negligence per

---

[5] It is true that Congress did not create an express cause of action for reimbursement under FEHBA. Cf. 5 U.S.C. 8912 (granting federal courts jurisdiction "of a civil action or claim *against the United States* founded on" FEHBA) (emphasis added). But that is insufficient to defeat federal jurisdiction; the same was true in *Grable* itself, where Congress had similarly created a cause of action against the federal government to quiet title, but had not expressly provided for such an action between private parties. See 125 S. Ct. at 2369 n.4; cf. *Verizon Md., Inc.* v. *Public Serv. Comm'n*, 535 U.S. 635, 643 (2002) ("The mere fact that some acts are made reviewable should not suffice to support an implication of exclusion as to others.") (quoting *Abbott Labs* v. *Gardner*, 387 U.S. 136, 141 (1967)).

se under state law. In that case, the application of federal law to resolve the case was not the product of any decision by *Congress*; rather, state common law simply borrowed federal standards. As the Court explained in *Grable*, *Merrell Dow* viewed "the combination of no federal cause of action and no preemption of state remedies for misbranding as an important clue to Congress's conception of the scope of jurisdiction to be exercised under § 1331." *Id.* at 2370. Indeed, "[a] general rule of exercising federal jurisdiction over state claims resting on federal mislabeling and other statutory violations would * * * have heralded a potentially enormous shift of traditionally state cases into federal courts." *Id.* at 2370-2371.

In *Merrell Dow*, Congress's failure to preempt state-law actions based on a misbranding theory indicated Congress's intent that such actions should proceed essentially as state-law suits in state courts. By contrast, in this case Congress's enactment of Section 8902(m)(1) broadly to preempt any state law applicable to health insurance or plans establishes that Congress did *not* intend that actions concerning rights and duties under FEHBA contracts should proceed essentially as state-law actions in state court. Similarly, while recognizing federal jurisdiction in *Merrell Dow* would have caused a huge shift of cases traditionally litigated in state court into federal court, there is no substantial tradition of enforcing reimbursement (or any other) provisions in FEHBA contracts in state court. Thus, to require litigation about rights and duties under FEHBA contracts to be conducted in *state* court would upset the federal-state balance that Congress intended.

3. The federal issues in this case are "actually disputed and substantial" within the meaning of *Grable*. Respondent has not yet filed an answer in this case, because respondent successfully moved to dismiss the complaint before the answer was due. In those circumstances, it should be assumed as a general matter under *Grable* that respondent disputes all

of the elements necessary for petitioner to prevail; otherwise, a party could always obtain a dismissal of a case on jurisdictional grounds, so long as it had not yet filed an answer or other pleading indicating the scope of the actual dispute. Accordingly, unless the pleadings demonstrate that the defendant has limited the dispute to issues solely of state law, a court should ordinarily assume that a complaint that bases its right to relief on application of federal law presents questions of federal law that are "actually disputed."

Even if state law provides the bare cause of action, federal law would overwhelmingly predominate. This is not a case like those discussed in *Grable*, in which there is some present dispute about title to land that would otherwise be governed entirely by state law, and in which the sole potential federal issue in the particular case involves the federal statutes under which the title was originally granted decades previously by the United States. 125 S. Ct. at 2369 n.3 (citing *Shulthis* v. *McDougal*, 225 U.S. 561 (1912)). In that situation, concerns about transforming a broad range of what are fundamentally state-law cases into federal cases has led the Court to impose the "actually disputed and substantial" limitation to ensure that the suit is genuinely federal in character.

No such concerns are present here. Even if state law provided the bare cause of action, all of the significant legal issues that could arise would likely involve the construction and application of a FEHBA contract provision, which would necessarily present questions of federal law. Courts addressing reimbursement questions in other cases have had to decide such issues as the scope of the reimbursement obligation and extent, if any, to which the reimbursement should take account of attorney's fees expended by participant to obtain the tort recovery. See, *e.g.*, *Arkansas Dep't of Health & Human Servs.* v. *Ahlborn*, cert. granted, No. 04-1506 (Sept. 27, 2005). Those types of questions, which are likely to predomi-

nate in a case such as this, present substantial issues of federal law.

Furthermore, this is not a context in which factual issues are likely to predominate. The potential factual questions in this case would have to do with the amount of FEHBA benefits paid and the amount of tort recovery McVeigh actually received. There is no reason to believe that either of those relatively easily ascertainable figures is likely to be the subject of any significant dispute. But even if there is such a factual dispute in a particular case—and even if there is no dispute about the interpretation of federal law or the FEHBA contract in the case—federal jurisdiction is proper because the factual issues arise in the application of the federal contract, the suit seeks to recover benefits whose payment in the first instance is governed by federal law, the suit is pervasively federal in character on the merits, and the direct financial and other interests of the United States in the dispute make it especially appropriate that the courts of the United States should be open to its resolution. Cf. 28 U.S.C. 1345.

In short, permitting such cases to proceed in federal court is consistent with the paramount federal interest in the FEHBA program. Thus, even assuming that such claims are not based on a federal cause of action, recognizing federal jurisdiction is consistent with "the commonsense notion that a federal court ought to be able to hear claims recognized under state law that nonetheless turn on substantial questions of federal law, and thus justify resort to the experience, solicitude, and hope of uniformity that a federal forum offers on federal issues." *Grable*, 125 S. Ct. at 2367.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

MARK A. ROBBINS
General Counsel
KATHIE ANN WHIPPLE
Deputy General Counsel
JAMES S. GREEN
Associate General Counsel
JILL GERSTENFIELD
SUSAN WHITMAN
Attorneys
Office of Personnel Management

PAUL D. CLEMENT
Solicitor General
PETER D. KEISLER
Assistant Attorney General
EDWIN S. KNEEDLER
Deputy Solicitor General
JAMES A. FELDMAN
Assistant to the Solicitor General
MARK B. STERN
ALISA B. KLEIN
SCOTT A. HERSHOVITZ
Attorneys

FEBRUARY 2006